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KARL J. DREHER
Director

MEMORANDUM

To: Cindy Yenter
Water District 130 Watermaster

Date: June 13, 2002

From: Karl J. Dreher

cc: Clear Springs Foods, Inc.
Clear Lakes Trout Co.
Norm Young
Allen Merritt
Tim Luke

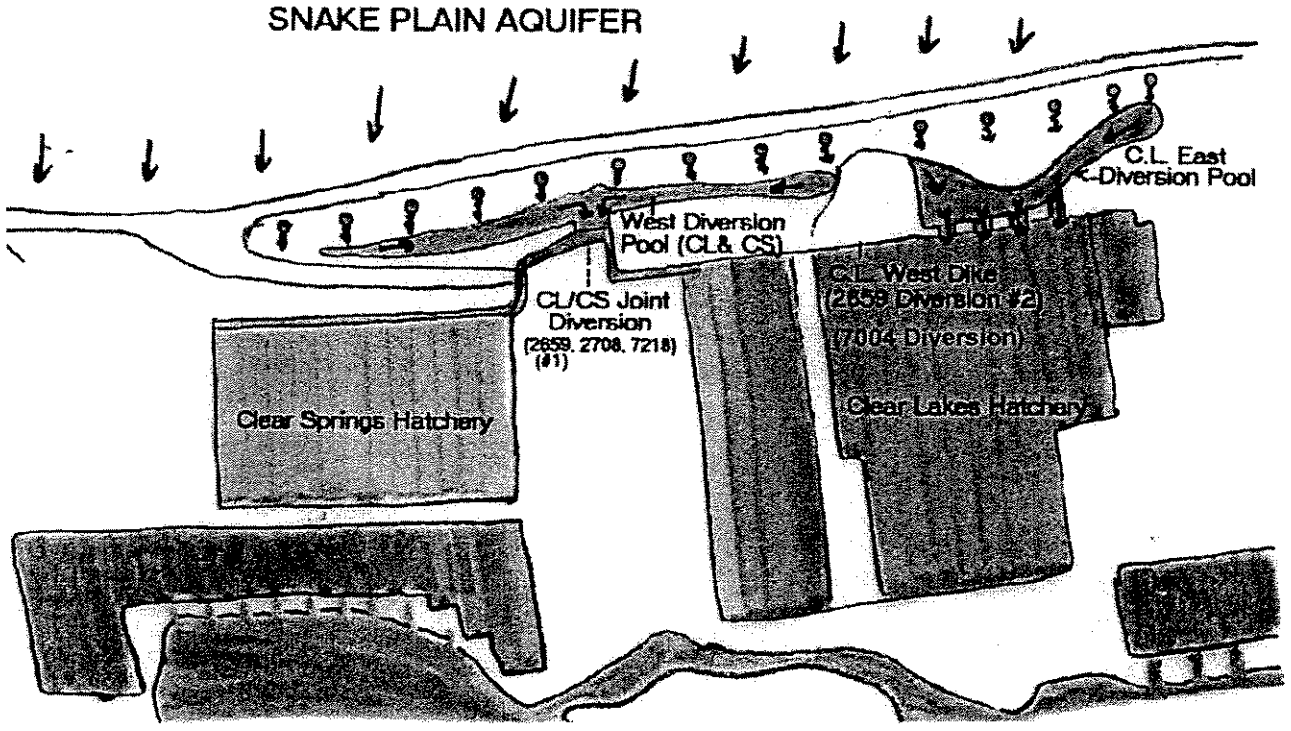
Subject: Amended Water District 130 Watermaster Instructions No. 02-01 – Distribution of Water Among Water Rights Nos. 36-02659, 36-02708, 36-07004, 36-07201, and 36-07218

Background Summary

Clear Springs Foods, Inc. (aka Clear Springs Trout Company or "Clear Springs") and Clear Lakes Trout Company ("Clear Lakes") separately own and operate adjacent fish hatcheries located below the rim of the Snake River canyon north of Buhl, Idaho. During the development of the hatcheries in the 1960s and 1970s, both Clear Springs and Clear Lakes filed applications with IDWR for permits to appropriate water from springs flowing from the Eastern Snake Plain Aquifer, and five water rights were established as follows: 36-02659 (Clear Lakes, 100 cfs, 06/23/1966); 36-02708 (Clear Springs, 200 cfs, 09/28/1966); 36-07004 (Clear Lakes, 75 cfs, 07/21/1967); 36-07201 (Clear Springs, 10 cfs, 08/04/1971); and 36-07218 (Clear Springs, 51.55 cfs, 01/24/1972). The current layout of the adjoining hatcheries and water right diversion points (except for water right no. 36-07201) are shown on the next page.

On March 13, 1980, Clear Springs and Clear Lakes entered into an agreement settling disputes regarding property ownership, access, operation and maintenance of common facilities, and the responsibilities of both parties. The 1980 agreement also provided for allocation of water between water rights nos. 36-02659, 36-02708, and 36-07004, when the amount of water flowing from springs and available under these three water rights is less than 375 cfs. The agreement provided that:

> Although priority is acknowledged regarding Permit No. 36-2659 above, since there is some dispute as to the relative priorities of Permits Nos. 36-2708 and 36-7004, it is agreed, in the event the water being produced by the Clear Lakes' springs, which is available to [Clear] Lakes and [Clear] Springs under their respective permits, goes below



375 cubic feet per second, that, until a legal determination is made or agreement made regarding Permits Nos. 36-7004 and 36-2708, if there is a reduction the reduced flow below 375 cubic feet per second will be divided proportionately between [Clear] Springs and [Clear] Lakes in the ratio of 200 to 375 and 175 to 375, or 53% to [Clear] Springs and 47% to [Clear] Lakes. All water being used by [Clear] Springs and [Clear] Lakes is to be included in the calculations, including that used in their trout processing facilities, except water being utilized by [Clear] Springs under Permit No. 36-7201. *Agreement,* pp. 3 – 4.

On November 2, 1992, IDWR filed the ***Director's Report for Reporting Area 3*** including it's recommendations for decreeing Clear Springs' water rights nos. 36-02708, 36-07201, and 36-07218. The "source" recommended by IDWR for all three Clear Springs water rights was springs tributary to Clear Lake(s). Clear Lakes filed objections to both the "source" and "point of diversion" elements of IDWR's recommendations for Clear Springs' water rights 36-02708 and 36-07218 alleging that these rights are diverted from a separate source than is Clear Lakes' water right no. 36-07004. Clear Lakes also filed objections to both the "source" and "point of diversion" elements of IDWR's recommendation for Clear Springs' water right 36-07201 alleging that Clear Lakes "has a water right [no. 36-02659] that diverts from the [same] source that supplies this water right [no. 36-07201]."

The Special Master for **In Re SRBA, Case No. 39576 (Subcases 36-02708, 36-07201, and 36-07218)** issued ***Findings of Fact and Conclusions of Law on Involuntary Dismissal*** (August 21, 1998); ***Special Master's Report and Recommendations*** (August 28, 1998); and ***Order***

Granting in Part, Denying in Part, Motion to Alter or Amend (Amended Findings of Fact and Conclusions of Law on Involuntary Dismissal – Source) (December 31, 1998). Among other determinations, the Special Master concluded that "The source element for each water right [of Clear Springs] shall be reported as stated in the Director's Report for each water right" and that "the point of diversion for all the rights [of Clear Springs] shall be decreed as recommended in the Director's Report." Clear Lakes subsequently filed Notice of Challenge and after arguments, the Presiding Judge for the SRBA issued ***Memorandum Decision and Order on Challenge*** dated July 9, 1999. The Presiding Judge overruled and denied Clear Lakes' challenges to the Special Master's recommendation in all respects except one: the source for Clear Springs' water right no. 36-07201. Clear Lakes then filed Motion to Alter or Amend Judgment, and the Presiding Judge issued ***Order on Motion to Alter or Amend Judgment or in the Alternative, Motion to Reconsider Memorandum Decision and Order on Challenge*** on August 15, 2000, denying Clear Lakes' motion.

The SRBA court issued partial decrees for Clear Springs' three water rights on April 10, 2000. After Clear Lakes' Motion to Alter or Amend judgment was denied by the SRBA court, Clear Lakes appealed to the Idaho Supreme Court. ***Idaho Supreme Court 2002 Opinion No. 17*** was filed on January 18, 2002, affirming the SRBA court ***Memorandum Decision and Order on Challenge***.

Following an inquiry from Clear Springs regarding how IDWR intended to administer the water rights held by Clear Springs and Clear Lakes in the event of a call, both Clear Springs and Clear Lakes were asked to submit any additional information that either entity believed to be pertinent in developing watermaster instructions for administering these water rights. Both Clear Springs and Clear Lakes submitted information on May 2, 2002, although Clear Springs asserted that it believed IDWR already possessed all the necessary information to develop watermaster instructions.

In its May 2 submittal, *Memorandum Re: Administration of water right nos. 36-02659, 36-02708 and 36-07004*, as amended on May 7, Clear Lakes concludes that: (1) adjustment of the 6-ft adjustable weir from the west diversion pool through which water right 36-02659 is distributed to Clear Lakes would result in reducing the quantity of water distributed to the Clear Lakes' senior water right 36-02659 in favor of Clear Springs' junior water right 36-02708, which is precluded by Idaho law because Clear Lakes' senior water right would be injured; and (2) it is physically impossible to reduce diversions under Clear Lakes' water right 36-07004 from the east diversion pool to increase the quantity of water available for Clear Springs' relatively senior water right 36-02708, making any call by Clear Springs to distribute water to Clear Springs' water right 36-02708 against Clear Lakes' water right 36-07004 futile.

Basis for Watermaster Instructions - Administration of Water Rights 36-02659, 36-02708, 36-07004, and 36-07218

Seven of the nine Findings of Fact set forth by the Special Master in ***Order Granting in Part, Denying in Part, Motion to Alter or Amend (Amended Findings of Fact and Conclusions of Law on Involuntary Dismissal – Source)*** (December 31, 1998), adopted by the Presiding Judge in ***Memorandum Decision and Order on Challenge*** (July 9, 1999), and affirmed by the Idaho Supreme Court in ***Idaho Supreme Court 2002 Opinion No. 17*** (January 18, 2002) that are the most pertinent to the administration of water rights nos. 36-02659, 36-02708, 36-07004, and 36-07218 are as follows:

> 2. The place of use for both Clear Springs and Clear Lakes is located in the Snake River Canyon north of Buhl, Idaho. All the water used by both Clear Lakes and Clear Springs originates from springs flowing from the Snake River Plain Aquifer. Prior to development of the rights, the water from all the springs ran into a channel of water, flowed between three separate islands, emptied into Clear Springs Lake, and then ultimately emptied into the Snake River. [citations omitted]
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> 3. Earl Hardy participated in the development of Clear Lakes' water rights. Mr. Hardy testified that prior to any development of water rights 36-02659 and 36-07004, there were two stream flows from the original stream channel. Mr. Hardy testified that there was an underwater division point in the stream channel creating a "western" and "eastern" flow. ... [citations omitted]
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> 4. After the close of Clear Lakes' case, the historic dividing point between the eastern and western flows remained unclear. According to Mr. Hardy, the historic dividing point was located 80 feet from the gate on the western dyke. Clear Lakes' expert hydrologist, Sheryl [sic] Chapman, gave several opinions on the historic dividing point. One estimate was that the historic dividing point was located 30-40 feet to the east of where Mr. Hardy estimated the historic dividing point (110-120 feet from the gate on the western dyke). Mr. Chapman's other estimate was that the dividing point was located somewhere between the "highest western flow" and the "highest eastern flow" ... [citations omitted]
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> 5. When water rights 36-02659 and 36-07004 were first developed, Clear Lakes created two pools, a western and an eastern pool. The result of this construction was the elimination [of] one of the three islands and one of the three original stream channels. As to the eastern pool, the construction performed by Clear Lakes consists of several dams which are actually a single diversion structure. This single diversion structure includes the dam in the eastern stream, which is then connected to a dam on the south side of the stream channel, which is then connected to the dam located in the western stream. "But for" this one continuous structure, there would not be an eastern pool. The result of this diversion structure was that all the water contained in the western pool originates entirely from the original western flow, while water contained in the eastern pool originates from both the original western and eastern flows. [citations omitted]

> 6. While there may have been two separate stream flows after Clear Lakes' initial development, the final and current diversion structures created by Clear Lakes for water rights 36-02659 and 36-07004 eliminated the eastern flow. Any water that flowed east is currently contained in the eastern pool. The historic eastern and western flows are commingled in the eastern pool. Based on the development of water rights 36-02659 and 36-07004, Mr. Chapman conceded that whatever dividing point which may have existed does not exist today. [citations omitted]
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> 7. As to the water in the eastern pool, there is no way to determine how much of the water is from the eastern or western flow. There is no way to determine whether water right 36-07004 uses water only from the eastern source, or that water right 36-02659 uses water only from the western source. Because the water in the eastern pool is commingled, there is no way to separate or differentiate water in the eastern pool as "western" or "eastern" water. [citations omitted]
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> 8. There are two discharge point[s] from the eastern pool. Part of water right 36-0259 is diverted out of flumes from the eastern pool. The other part of 36-02659 is diverted out of a gate located in the western pool. All of water right 36-07004 is diverted out of gates located in the eastern pool. Mr. Chapman conceded that there are no current discharge points into the Clear Lakes' facility located within the eastern pool at any point east of the historic dividing point. Stated differently, the discharge points for water right 36-07004 are located to the west of the alleged historic dividing point. [citations omitted]

Given these findings, particularly findings 6 and 7, it is clear that the SRBA court has determined that Clear Springs' water rights 36-02708 and 36-7218 together with Clear Lakes' water rights 36-02659 and 36-07004 divert water commingled from various springs which constitute a single, non-segmentable, source. Regarding the administration of Clear Lakes' water right 36-07004, the Special Master determined the following conclusion of law:

> The undisputed facts are that the source of water for water right 36-07004 uses water from both the western and eastern flows, and that the current discharge point for that water right is on the western side of the historic dividing point. The result is that water right 36-07004 uses water from both the western and eastern flows; the same western water that historically was the source for all of Clear Springs' rights. Because of these simple facts, there is no way to administer water right 36-07004 as [being from] a separate source from the Clear Springs rights. *Order Granting in Part, Denying in Part, Motion [to] Alter or Amend*, p.7.

The Presiding Judge for the SRBA court did not disturb this conclusion, and the Idaho Supreme Court affirmed after stating: "The special master's conclusions of law, which are also adopted by the SRBA district court, are treated as the conclusions of the district court." *Idaho Supreme Court 2002 Opinion No. 17*, p. 4. In his ***Order on Motion to Alter or Amend Judgment*** dated August 15, 2000, the Presiding Judge discussed the administration of two hypothetical water rights with differing priority dates in a setting the judge described as being analogous to the setting between the Clear Springs and Clear Lakes water rights:

> An example of such a situation occurs where a stream flow divides into two separate channels, a west channel and an east channel. [Note that the judge uses the terms "stream" and "channel" synonymously.] Assume a senior appropriator has a point of diversion downstream from the fork on the west channel. A junior appropriator's point of diversion is also downstream from the fork but located on the east channel. The "source" for the two water rights is the same common stream. [citations omitted] However, because both points of diversion are located below the divide in the stream, no matter how much water the junior diverts, the senior's water supply will not be affected because of the natural flow of the water between the respective channels. Even in times of shortage, for purposes of administering the respective water rights, the senior could not make a successful delivery call against the junior, as the call would be futile. Stated differently, cutting off the junior's water supply at the point of diversion would not increase the senior's water supply. [citations omitted] Furthermore, the senior would not be able to manipulate the actual flow of water down the respective channels [other than the lawful removal of stream channel obstructions] to increase the flow in the west channel, as the senior would be changing the point of diversion. The junior is protected by the "no injury rule" and could enjoin the senior from changing the point of diversion. [citations omitted] In essence, the junior is protected by the respective location of the diversion works on the common source.
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> In the event that the junior relocates his point of diversion upstream from where the stream divides, the situation has a potentially different outcome. The junior is not afforded the same protection previously created by the natural flow of the stream. Now cutting off the junior's water supply may well increase the senior's water supply. The junior could argue that based on the present stream flow level even though he is located above the fork in the stream, the water that he is diverting mostly, or even entirely, flows down the eastern channel and, thus, shutting off his diversion works would not increase flows to the senior. Depending on where the junior relocated his diversion works, this may be true. ... The junior would have the opportunity to try to show that the call would be futile. In any event, the source of water for the two diversion works is nonetheless the same.
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> In taking a variation to the above example, suppose both the junior and senior decide to modify their respective diversion works by altering the natural course of the stream and constructing a reservoir from which both intend to divert. **The modifications again eliminate the protection afforded the junior** by the natural fork in the stream [emphasis added]. The source is the same and the junior has permitted the senior to change his point of diversion despite the potential for injury. This is what occurred between Clear Lakes and Clear Springs in the instant case – the natural flow of the stream has been altered. *Order on Motion to Alter or Amend Judgment*, pp. 6 – 8.

In its May 2 memorandum, Clear Lakes concedes that the "source" element for water rights 36-02659, 36-02708, and 36-07004 has been decreed to be the same source (springs tributary to Clear Lake or Lakes). Clear Lakes, however, in essence contends that because: (a) water right 36-02708 is only diverted out of the western diversion pool and does not have a point of diversion out of the eastern diversion pool; and (b) water right 36-07004 is only diverted out of the eastern diversion pool and does not have a point of diversion out of the western pool; then

reducing the amount of water diverted under Clear Lakes' right 36-07004 will not make water available for Clear Springs' right 36-02708, and the amount of water diverted from the western pool under Clear Lakes' right 36-02659 can not be reduced to make water available for Clear Springs' right 36-02708, since right 36-02659 is the senior right. While the decrees for water rights 36-02708 and 36-07004 clearly recognize separate points of diversion from the western and eastern pools, respectively, the practical result of Clear Lakes' premise would be that Clear Springs' water right 36-02708 and Clear Lakes' water right 36-07004 would be administered as if they were from separate sources. However, the Presiding Judge for the SRBA court, as quoted above, has in effect concluded that the modifications to the diversions for the Clear Lakes and Clear Springs water rights has "eliminated the protection" afforded Clear Lakes' water right 36-07004.

Clear Lakes' conclusion that adjustment of the 6-ft adjustable weir from the west diversion pool, through which water right 36-02659 is distributed to Clear Lakes, would result in reducing the quantity of water distributed to the Clear Lakes' senior right 36-02659 in favor of Clear Springs' junior right 36-02708 is not correct. When the amount of water discharging from the springs to the eastern and western diversion pools is less than 375 cfs, the 6-ft adjustable weir from the west diversion pool should be adjusted such that the first 100 cfs of water from both diversion pools is attributed to Clear Lakes' water right 36-02659, the next 200 cfs of water or part thereof is attributed to Clear Springs' water right 36-02708, and any remaining water is attributed to Clear Lakes' water right 36-07004. By adjusting the weir to achieve this distribution, Clear Lakes' water right 36-02659 is **not** reduced to provide water for the junior Clear Springs' water right 36-02708 from the west diversion pool. Rather, adjustment of the weir results in Clear Lakes' water right 36-07004 being reduced to provide water to Clear Springs' senior water right 36-02708 while maintaining the supply of water to the most senior right, Clear Lakes right 36-02659.

The full amount of water under the most senior right, Clear Lakes' right 36-02659, must be available for that right. When Clear Springs' water right 36-02708 is also in priority, this requires that more of the water diverted under Clear Lakes' right 36-02659 be diverted from the eastern diversion pool than has historically been the case when spring flows fell below 375 cfs. Clear Lakes alleges that causing it to divert more water from the eastern diversion pool under its senior right 36-02659 injures that right. But absent a basis for Clear Lakes being able to rely on diverting a specific portion of the water under its senior right 36-02659 from the western diversion pool, there is no injury to Clear Lakes' senior right 36-02659 so long as the right is fully satisfied and the extent of beneficial use made under right 36-02659 is not diminished. As the holder of the junior priority right 36-07004, Clear Lakes is obviously affected by this distribution of water since the amount of water diverted under its junior priority right 36-07004 and the extent of the beneficial use under that right are both reduced. However, this does not constitute injury to Clear Lakes' senior right 36-02659.

So the question becomes: "Does Clear Lakes have a legal basis for relying on diverting a specific portion of the water under its right 36-02659 from the western diversion pool?" Under the 1980 agreement, Clear Lakes and Clear Springs agreed that "until a legal determination is

made or agreement made regarding Permits Nos. 36-7004 and 36-2708," that when spring flows into the eastern and western diversion pools fall below 375 cfs, Clear Lakes had the right to use a total of 47 percent of the spring flows under its rights 36-02659 and 36-07004, and Clear Springs had the right to use 53 percent of the spring flows under its right 36-02708. This allocation essentially results in the distribution of water between rights 36-02659, 36-02708, and 36-07004 as if all three rights were equal in priority, even though Clear Springs recognized Clear Lakes' right 36-02659 as the senior right. Issuance of the partial decrees for these rights by the SRBA court is clearly a "legal determination", and the allocation of spring flows under the 1980 agreement is no longer binding on either Clear Lakes or Clear Springs. Clear Lakes presumably agrees because in its May 2 memorandum, it asserts that when spring flows into the eastern and western pools fall below 375 cfs, the proper administration of rights 36-02659, 36-02708, and 36-07004 under the partial decrees is to distribute the first 34 cfs out of the eastern diversion pool and the first 66 cfs out of the western diversion pool to the senior Clear Lakes right 36-02659, with the remaining flow from the eastern pool going to Clear Lakes' right 36-07004 and the remaining flow from the western pool going to Clear Springs' right 36-02708. The quantities of 34 cfs and 66 cfs, are the amounts historically diverted by Clear Lakes from the eastern and western pools, respectively, when spring flows into the pools totaled at least 375 cfs. Therefore, as the holder of the most senior right diverting from either pool, Clear Lakes asserts that it has the right to divert a specific portion of the water under its right 36-02659 (66 cfs) from the western diversion pool.

The partial decree issued by the SRBA court is the first reference for determining whether Clear Lakes has a legal right to divert a specific portion of the water under its right 36-02659 from the western pool. The amended partial decree for water right 36-02659 contains the following remark under the legal description for its two points of diversion:

> This water right is diverted through a combination of two adjacent spring-fed diversion pools: (1) a diversion pool known as the "western pool" located in the S ½ SESWNE and the S ½ SWSENE, T09S, R14E, Section 2; and (2) a diversion pool known as the "eastern pool" located in a portion of Government Lot 5 known as the SWSESENE and SESWSENE, T09S, R14E, Section 2. Both pools divert water from the common source identified in the source element of this water right ...

While this remark clearly recognizes that Clear Lakes' water right 36-02659 is "diverted through a combination" of the western and eastern diversion pools, there is no recognition in the decree that Clear Lakes has the right to determine how much water is diverted from each pool under right 36-02659. Under Idaho law, the holder of a water right senior in priority to a junior priority right diverting from the same source clearly has the right to divert water ahead of the junior right provided water diverted under the senior right is reasonably needed and used for the beneficial use and in accordance with other provisions defined in a permit, license superceding the permit, or finally a decree for the right. However, the courts have found that diversion and use of water under a senior priority is not an unrestricted right and is subject to reasonableness.

For example, in *Schodde v. Twin Falls Land and Water Co.*, 161 F. 43 (1908), affirmed 224 U.S. 107 (1912), the plaintiff brought an action against the defendant and alleged damages caused by

the defendant's construction of Milner Dam. The plaintiff had appropriated water from the Snake River to irrigate farmland and provide water for a small mining operation. *Id.* The plaintiff's historic means of diversion was to use water wheels to lift the water out of the river. *Id.* The plaintiff also constructed wing dams in the river to confine the flow of the river so that the current would drive the water wheels and cause them to carry the water to the necessary height. *Id.* The defendant subsequently constructed a dam to form a reservoir, raising the water level behind the dam about 40 feet, for the purpose of supplying water for irrigation and domestic purposes to settlers on about 300,000 acres of land situated below defendant's dam. *Id.* at 44. The plaintiff alleged that the defendant's dam backed water up to and beyond the plaintiff's premises making it impossible for the water wheels to work and sued for damages. *Id.* The court did not deny the plaintiff's right to divert water and the plaintiff did not argue that his appropriation was not present after the construction of the dam. *Id.* at 45. The plaintiff claimed that he could no longer divert water by the means he first adopted and that the defendant deprived him of the right to the current of the river, which, prior to the erection of the dam, "rendered his means of diversion available." *Id.* The court found that "the current of the river was no part of plaintiff's water location, and that he has no cause of action against the defendant for destroying his current." *Id.* at 47. The court then held that "[t]he claim of the plaintiff that the means of utilizing the current is attached as an appurtenance to the appropriation is...untenable" and that "it is immaterial to the state what particular method is used." *Id.* at 47. The court then stated "[t]he method adopted cannot be said to have attached as appurtenant to the appropriation as against other [junior] appropriators of water from the same stream." *Id.*

In *Schodde*, it seems clear that the court was not concerned with the method of diversion as long as the holder of a senior priority water right was able to continue full use of the right without unreasonably excluding the use of water under a junior priority water right from the same source. Clear Lakes is correct in its assertion that Idaho law does not allow regulation or curtailment of a senior water right in order to increase the water supply to a junior water right in times of shortage, or otherwise. However, if it is possible for Clear Lakes' senior water right 36-02659 to be fully satisfied and also allow for the next water right in priority from the same source to be exercised (Clear Springs' right 36-02708), then Clear Lakes is not correct in claiming that it has a right to the historical method of diversion or the historical allocation between alternative diversion points. Such method or allocation would diminish the amount of water available for the next water right in priority held by Clear Springs, and allow Clear Lakes to proceed to divert water under an even more junior right from the same source (Clear Lakes' right 36-07004) when the more senior right 36-02708 has not been satisfied.

A similar conclusions results from *Parker v. Wallentine*, 103 Idaho 506, 650 P.2d 648 (1982). In *Parker*, the defendant drilled a well on his property in Bear Lake County to a depth of 200 feet "for the purpose of providing irrigation for a 64 acre field." *Id.* at 507, 650 P.2d at 649. The well was located approximately 125 to 150 feet from a domestic well owned by the plaintiff, which was drilled to a depth of 71 feet. *Id.* After a pump test was conducted on the defendant's well, the plaintiff discovered that his domestic well had ceased to produce water. The following morning the well did produce water, but the water was muddy and continued to be so for several days. *Id.* The plaintiff filed suit against the defendant and obtained a temporary restraining

order that prohibited the defendant from operating his pump. *Id.* at 507-08, 650 P.2d at 649-50. The district court then granted a permanent injunction against the use of the irrigation well. *Id.* The defendant appealed the injunction and asserted that allowing one shallow domestic well to block the development of all irrigation wells in a given area is inconsistent with the policy of optimum development of water resources in the public interest. *Id.* at 511, 650 P.2d at 653. The court stated that the assertion had merit and held that the defendant "has a right to divert any surplus subterranean waters provided and so long as his diversion of such waters does not deprive Parker of his use of the water." *Id.* at 514, 650 P.2d at 656. The court then explained that Parker would not be deprived of any right to his use "if water can be obtained for Parker by changing the method or means of diversion." *Id.* The court then stated that the expense of changing the method or means of diversion must be paid by the subsequent appropriator. *Id.*

Although the *Parker* case dealt with ground water, its principles apply to administration of the Clear Lakes and Clear Springs water rights. When the spring flows into and out of the western and eastern pools have been at least 375 cfs, Clear Lakes claims to have historically received 66 cfs from the western pool and 34 cfs from the eastern pool to satisfy its senior priority water right 36-02659. Clear Lakes now claims that as the holder of the most senior priority water right diverted from the western and eastern pools, that this water right 36-02659 must receive 66 cfs from the western pool even if the next right in priority from the same source, Clear Springs' right 36-02708, is not satisfied while the more junior water right from the same source, Clear Lakes' right 36-07004, continues to divert water from the eastern pool and is insulated from the more senior Clear Springs' right diverted out of the western pool. However, if there is another reasonable means of diversion to satisfy Clear Lakes' senior priority right 36-02659 (i.e., diverting more of the water under right 36-02659 from the eastern pool), then Clear Lakes would not be deprived of using water under its senior priority right. This is the principle articulated in *Parker*. Full diversion of 100 cfs under Clear Lakes' right 36-02659 can be achieved by diverting more of the right out of the eastern pool and decreasing the amount of water diverted out of the western pool, while still providing for diversion and use of the full amount of water under the right. This would allow more water to be diverted under the next right in priority from the same source, Clear Springs' right 36-02708. If expenses are incurred by Clear Lakes in diverting water from the eastern pool under the senior right 36-02659, not the junior right 36-07004, then under *Parker*, Clear Springs may be responsible for those costs. However, since the eastern pool already has the diversion capacity for the full 100 cfs diversion under right 36-02659, it does not appear that Clear Springs would be obligated to pay anything.

Therefore, there is no known legal basis for Clear Lakes to demand that a specific portion of the water for 36-02659 be distributed from the western diversion pool so that water is available to Clear Lakes' junior right 36-07004 from the eastern diversion pool to the detriment and injury of the Clear Springs right 36-02708. Additionally, it is physically possible to reduce diversions under Clear Lakes' water right 36-07004 from the east diversion pool to provide more water from the eastern pool under Clear Lakes' senior right 36-02659 resulting in an increase in the quantity of water available for Clear Springs' right 36-02708, which is senior to Clear Lakes' right 36-07004. Thus a call from Clear Springs' right 36-02708 against the junior Clear Lakes' right 36-07004 is not futile.

Consequently, when the amount of water flowing from the springs is equal to or greater than 375 cfs, then both of Clear Lakes' water rights 36-02659 and 36-0704 as well as Clear Springs' water right 36-02708 can be filled, along with part or all of Clear Springs' water right 36-07218 when spring discharges exceed 375 cfs. But until and unless there is either a legal determination or a subsequent agreement between Clear Lakes and Clear Springs that provides for Clear Lakes diverting a specified portion of water under its right 36-02659 from the western pool, when the amount of water flowing from springs and available under the three water rights 36-02708, 36-02659, and 36-07004 is below 375 cfs, and when the more senior rights call for and confirm that the water is needed under those senior rights, water must be distributed to the rights in priority as being from a single source. The "source" element for water rights 36-02659, 36-02708, 36-07004, and 36-07218, is springs tributary to Clear Lake(s). For the purposes of adminstering these water rights, the eastern and western diversion pools are inextricably linked to the springs whose discharge is collected in the pools. Water rights 36-02659, 36-02708, and 36-07004 must not be administered in the manner set forth by Clear Lakes in its May 2 memorandum as though the rights were from separate sources.

Basis for Watermaster Instructions - Administration of Water Right 36-07201

In ***Memorandum Decision and Order on Challenge*** dated July 9, 1999, the Presiding Judge for the SRBA court concluded the following (p. 29):

> ... the Brailsford Stream, or what is sometimes referred to as the "far western stream," which is the source of Clear Springs' right 36-07201, **never** ran into the channel or pool of water from which Clear Lakes' rights 36-02659 and 36-07004 and Clear Springs' rights 36-02708 and 36-07218 are diverted. To the contrary, it flows to the west of this pool and eventually enters Clear Lake at a point well below the diversion works of the other four rights.
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> ... because the springs that feed the Brailsford stream are different from the springs that feed the channel for the other four rights, and because those streams meet for the first time at Clear Lake which is well below the respective points of diversion, then for purposes of administration as between the five rights involved in this case, the Brailsford stream is a different "source". It is a separate source for purposes of determining priority in the event of a call between these respective right holders.

Based on the clear language in the Presiding Judge's Decision and Order, Clear Springs' water right 36-07201 is to be administered as being from a source separate and distinct from the source for rights 36-02659, 36-02708, 36-07004, and 36-07218.

Watermaster Instructions

1. Water for Clear Springs' water right 36-07201 is to be distributed separately as being from a separate "source" from the "source" for water rights 36-02659, 36-02708, 36-07004, and 36-07218.

2. The watermaster is not to adjust the 6-ft adjustable weir unless Clear Lakes calls for distribution of water to its senior priority water right 36-02659 or Clear Springs calls for distribution of water to its water right 36-02708, which is next in priority. Such calls must be in writing to either IDWR or the watermaster.

3. If the watermaster receives a written call for distribution, the watermaster is to notify IDWR's Regional Manager in Twin Falls, or alternatively the Manager of the Water Distribution Section of the Water Management Division in the event the Regional Manager is unavailable.

4. IDWR and the watermaster must determine that when a call is made, water is needed under the senior priority water right making the call and that if additional water is distributed to the calling senior right, the water will be applied to the beneficial use authorized under the calling right. To accomplish this determination, the watermaster is to contact representatives of both Clear Lakes and Clear Springs to schedule a time for accessing Clear Lakes and Clear Springs properties, as soon as possible after a call is made, to ascertain the amount of water flowing from springs and available to water rights 36-02659, 36-02708, 36-07004, and 36-07218 (if any), as well as the need to distribute water among these rights based on priority.

5. As soon as the need for water under the calling senior right can be confirmed, IDWR and/or the watermaster will provide the holder of the junior priority water right or rights with 14-day notice by personal service to the water right holder, or the facility manager for the water right holder, and by mail or facsimile, if available, that the watermaster will adjust the 6-ft adjustable weir so as to distribute water to the calling senior right, reducing or curtailing the distribution of water to the remaining water right(s) in the order of the most junior priority of the remaining right(s) being reduced or curtailed first.

6. At expiration of the 14-day notice, the watermaster is to re-confirm the amount of water flowing from springs and available under water rights 36-02659, 36-02708, 36-07004, and 36-07218 (if any), based on priority, and to adjust the 6-ft adjustable weir as necessary to distribute water to the rights in order of priority.

7. The watermaster is to document, check, and adjust the distribution of water in accordance with priority of the rights on a weekly basis unless notified by either Clear Lakes or Clear Springs that flows have changed and adjustment is necessary.

8. To determine the amount of water flowing from springs and available to the above water rights, the watermaster must add together the quantities of water flowing to the Clear Lakes and Clear Springs hatcheries. To determine the amount of water flowing to the Clear Lakes hatchery (subject to further confirmation)[1]:

   (a) Read staff gage above the 40-inch west weir near the Clear Lakes hatchery holding ponds;

   (b) Determine discharge through the west weir from attached table for Clear Lakes west weir discharge;

   (c) Read staff gages on each of the six 10-ft Clear Lakes east weirs;

   (d) Determine discharge through each of the six Clear Lakes east weirs from the attached table for Clear Lakes east weirs;

   (e) Add 0.20 cfs to account for flow in the hatchery holding ponds through the perforated PVC pipe (if operating);

   (f) Add discharge from the west weir, each of the six east weirs, and the hatchery pipe to determine the total amount of water flowing to the Clear Lakes hatchery.

   To determine the amount of water flowing to the Clear Springs hatchery (subject to further confirmation)[2]:

   (g) Read staff gage in west diversion pool above 22-ft weir;

   (h) Determine discharge through the 22-ft and 10-ft weirs from attached table for Clear Springs combined weirs;

   (i) Add one (1) cfs to account for discharge of pipe into Clear Springs holding ponds and minor flow from pipes into headrace (if pipes are flowing);

   (j) Read weir measuring the discharge from the wet lab at the Clear Springs Research Laboratory.

   (k) Determine discharge for the wet lab effluent from the table for the Clear springs wet lab weir, or use the average flow which is estimated to be 0.5 cfs;

[1 & 2] Adapted from "REPORT ON WATER MEASUREMENT AND DISTRIBUTION PREPARED FOR CLEAR LAKES TROUT COMPANY AND CLEAR SPRINGS TROUT COMPANY – BUHL, IDAHO," by C. E. Brockway, P.E. and Keith E. Anderson, P.E., December 1988.

(l) Add discharge from the 22-ft and 10-ft weirs, the pipes into the holding ponds and headrace, and the wet lab, to determine the total amount of water flowing to the Clear Springs hatchery.

The total amount of water flowing from springs and available to water rights 36-02659, 36-02708, 36-07004, and 36-07218, is equal to the sum of (f) and (l).

8. If the total flow is equal to or greater than 375 cfs (± 5 cfs) then the amount of spring flows to Clear Lakes, 7.(f), should be 175 cfs with all the remaining flow to Clear Springs up to 251.55 cfs.

9. If the total flow is less than 375 cfs (± 5 cfs), then the watermaster is to adjust the 6-ft adjustable weir such that the first 100 cfs of spring flows goes to Clear Lakes, the next 200 cfs of spring flows or part thereof goes to Clear Springs, and any remaining flow goes to Clear Lakes.

10. If an adjustment to the 6-ft adjustable weir is required, the watermaster should do the following (subject to further confirmation)[3]:

    (a) Determine the required increase or decrease in flows to Clear Lakes to provide the flows to Clear Lakes and Clear Springs set forth in 9. above.

    (b) Measure the height in feet of the gate stem above the adjusting wheel nut on the 6-ft adjustable weir discharging from the west diversion pool and subtract 0.64 (datum adjustment) from the measured gate stem height.

    (c) Subtract (b) from the gage reading (in feet) from the staff gage in west diversion pool above Clear Springs' 22-ft weir.

    (d) Determine discharge through the 6-ft adjustable weir using the attached table for the 6-ft adjustable weir.

    (e) Add or subtract the required change in flows to Clear Lakes from (a) above to the measured discharge through the 6-ft adjustable weir determined from (d) and determine what the change in height for the gate stem measured from the adjusting wheel nut on the 6-ft adjustable weir should be to provide the changed flow to Clear Lakes.

    (f) Adjust the 6-ft adjustable weir up or down with the handwheel to achieve the required gate stem height as determined in (e).

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[3] Adapted from "REPORT ON WATER MEASUREMENT AND DISTRIBUTION PREPARED FOR CLEAR LAKES TROUT COMPANY AND CLEAR SPRINGS TROUT COMPANY – BUHL, IDAHO," by C. E. Brockway, P.E. and Keith E. Anderson, P.E., December 1988; and from letter report to Dan Steenson and Charlie Honsinger, Ringert Clark Chartered, from Dave Shaw, ERO Resources Corporation, May 2, 2002.

(g) Repeat (a) through (f), if necessary, after allowing sufficient time for the change in flows to stabilize through the hatcheries.

Attachments (9 pages)

CLEAR LAKES – 10-Ft. (East) Weirs

DISCHARGE (CFS)

(Corrected For Velocity Of Approach)

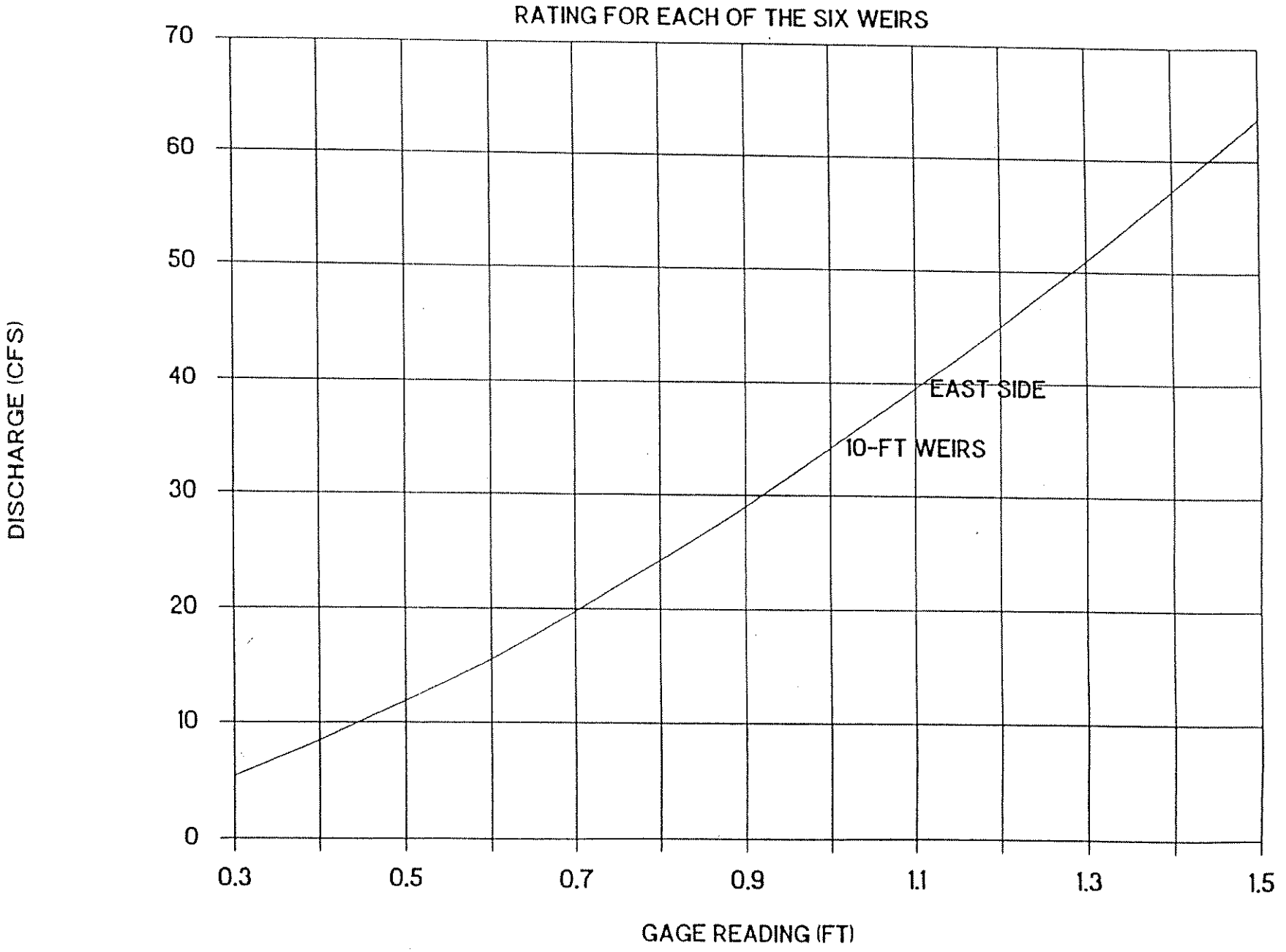
GAGE READING	0	0.01	0.02	0.03	0.04	0.05	0.06	0.07	0.08	0.09
0.3	5.49	5.77	6.05	6.34	6.63	6.93	7.23	7.53	7.84	8.16
0.4	8.48	8.80	9.12	9.45	9.79	10.13	10.47	10.81	11.16	11.52
0.5	11.88	12.24	12.60	12.97	13.35	13.72	14.10	14.49	14.87	15.26
0.6	15.66	16.06	16.46	16.86	17.27	17.68	18.10	18.52	18.94	19.36
0.7	19.79	20.22	20.66	21.10	21.54	21.98	22.43	22.88	23.34	23.80
0.8	24.26	24.72	25.19	25.66	26.13	26.61	27.09	27.57	28.06	28.55
0.9	29.04	29.53	30.03	30.53	31.04	31.54	32.05	32.57	33.08	33.60
1.0	34.12	34.65	35.17	35.70	36.24	36.77	37.31	37.85	38.40	38.95
1.1	39.50	40.05	40.61	41.16	41.73	42.29	42.86	43.43	44.00	44.57
1.2	45.15	45.73	46.32	46.90	47.49	48.08	48.68	49.27	49.87	50.47
1.3	51.08	51.69	52.29	52.91	53.52	54.14	54.76	55.38	56.01	56.64
1.4	57.27	57.90	58.54	59.18	59.82	60.46	61.11	61.75	62.41	63.06
1.5	63.72	64.37	65.04	65.70	66.36	67.03	67.70	68.38	69.05	69.73

CLEAR LAKES – 40-In. (West) Weir

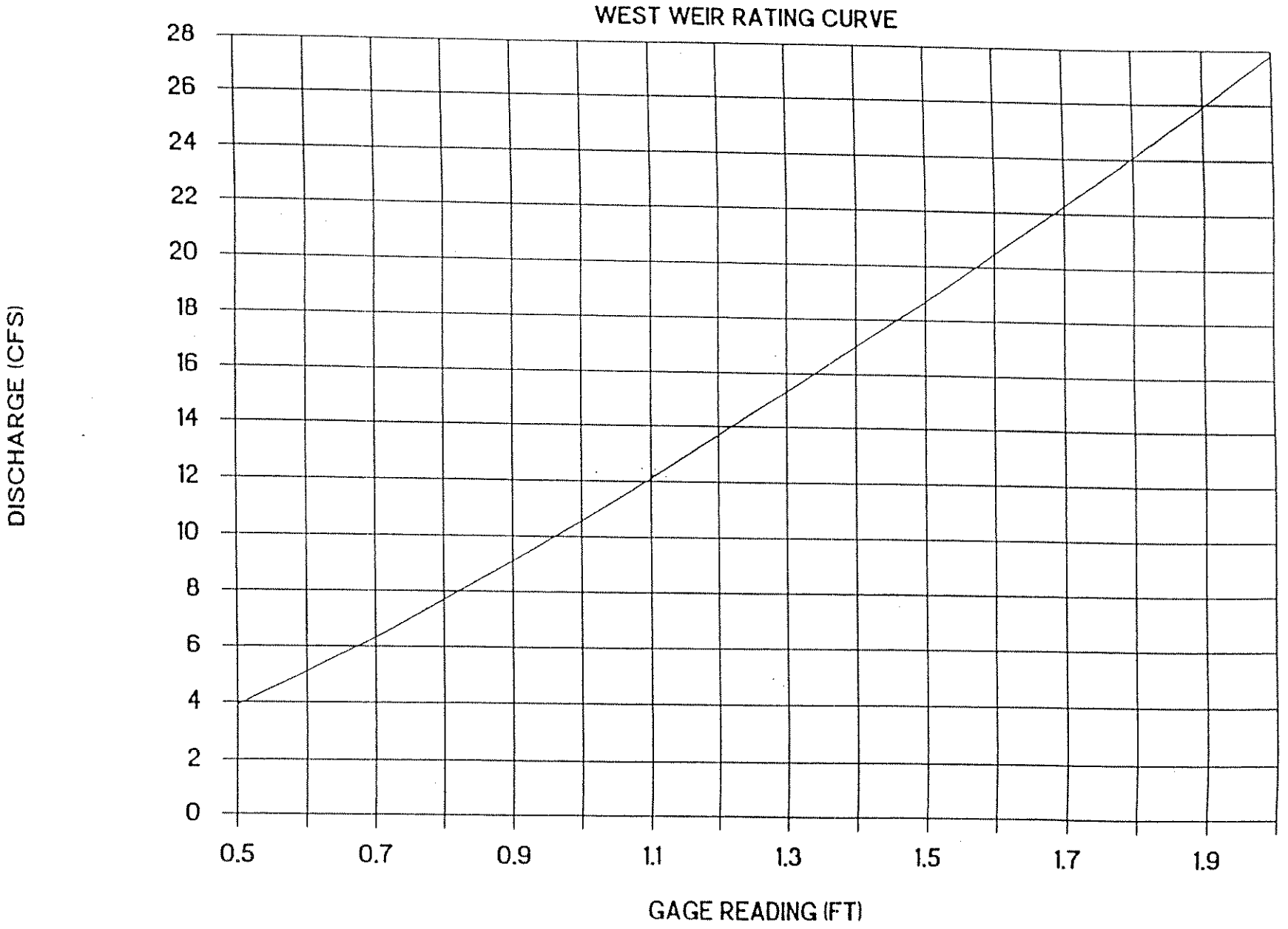
DISCHARGE (CFS)

GAGE READING	0	0.01	0.02	0.03	0.04	0.05	0.06	0.07	0.08	0.09
0.5	3.92	4.03	4.15	4.26	4.38	4.50	4.61	4.73	4.85	4.97
0.6	5.09	5.22	5.34	5.46	5.59	5.72	5.84	5.97	6.10	6.23
0.7	6.36	6.49	6.62	6.75	6.89	7.02	7.15	7.29	7.42	7.56
0.8	7.70	7.84	7.98	8.11	8.26	8.40	8.54	8.68	8.82	8.97
0.9	9.11	9.25	9.40	9.55	9.69	9.84	9.99	10.14	10.28	10.43
1.0	10.58	10.73	10.89	11.04	11.19	11.34	11.50	11.65	11.81	11.96
1.1	12.12	12.27	12.43	12.59	12.74	12.90	13.06	13.22	13.38	13.54
1.2	13.70	13.86	14.02	14.19	14.35	14.51	14.68	14.84	15.00	15.17
1.3	15.33	15.50	15.67	15.83	16.00	16.17	16.34	16.50	16.67	16.84
1.4	17.01	17.18	17.35	17.52	17.69	17.87	18.04	18.21	18.38	18.56
1.5	18.73	18.90	19.08	19.25	19.43	19.60	19.78	19.96	20.13	20.31
1.6	20.49	20.66	20.84	21.02	21.20	21.38	21.55	21.73	21.91	22.09
1.7	22.27	22.45	22.64	22.82	23.00	23.18	23.36	23.55	23.73	23.91
1.8	24.09	24.28	24.46	24.65	24.83	25.02	25.20	25.39	25.57	25.76
1.9	25.94	26.13	26.32	26.50	26.69	26.88	27.06	27.25	27.44	27.63
2.0	27.82	28.01	28.19	28.38	28.57	28.76	28.95	29.14	29.33	29.52

CLEAR LAKES TROUT CO -EAST SIDE WEIRS



CLEAR LAKES TROUT COMPANY

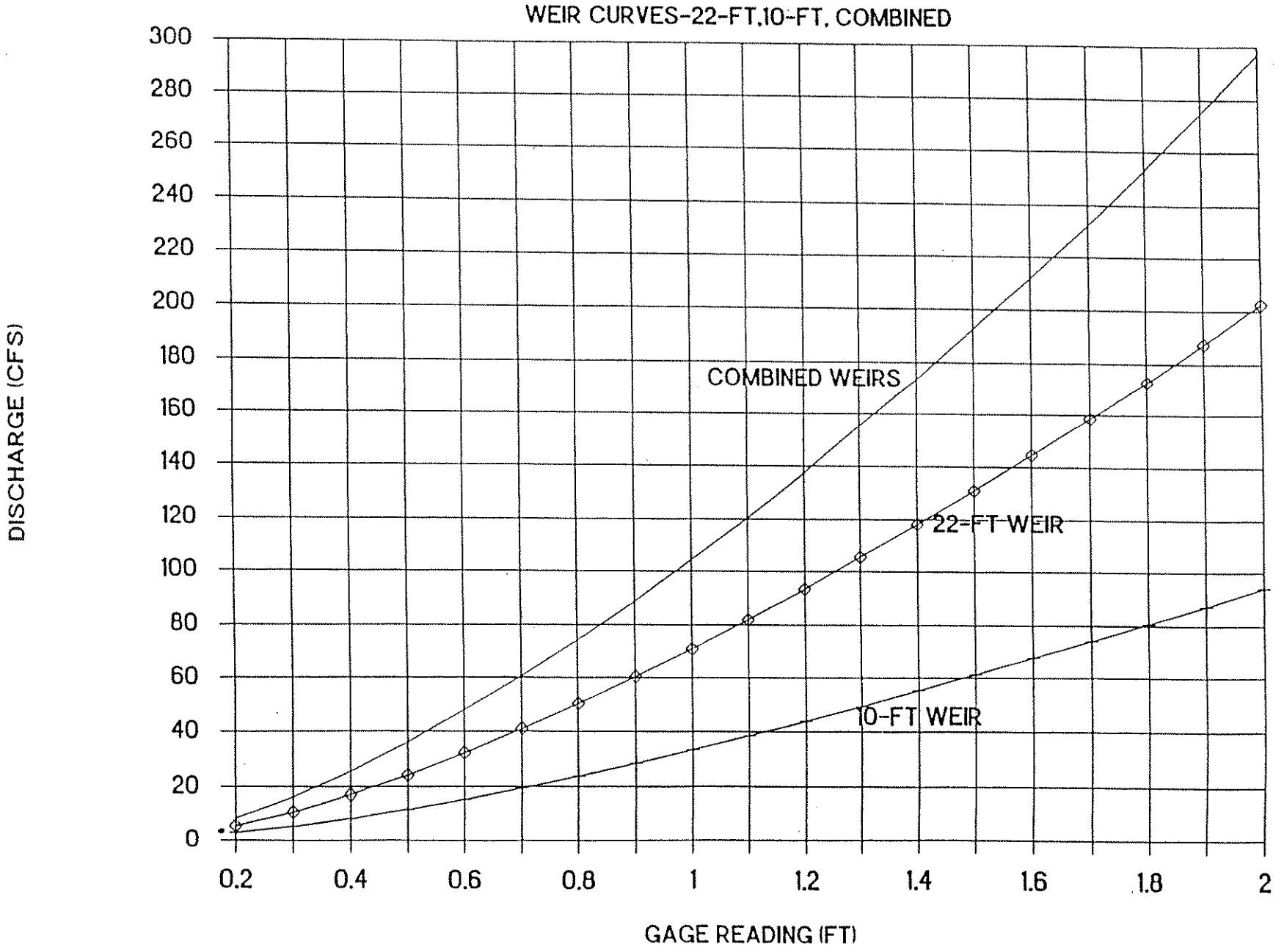


CLEAR SPRINGS – Combined Weirs

DISCHARGE (CFS)

GAGE READING	0	0.01	0.02	0.03	0.04	0.05	0.06	0.07	0.08	0.09
0.2 :	8.58	9.28	10.00	10.73	11.48	12.25	13.04	13.84	14.65	15.49
0.3 :	16.33	17.20	18.07	18.96	19.87	20.79	21.72	22.67	23.63	24.60
0.4 :	25.59	26.59	27.60	28.62	29.66	30.71	31.77	32.84	33.93	35.02
0.5 :	36.13	37.25	38.38	39.52	40.67	41.83	43.01	44.19	45.39	46.60
0.6 :	47.81	49.04	50.28	51.52	52.78	54.05	55.32	56.61	57.91	59.22
0.7 :	60.53	61.86	63.19	64.54	65.89	67.26	68.63	70.01	71.40	72.80
0.8 :	74.21	75.63	77.05	78.49	79.93	81.39	82.85	84.32	85.80	87.28
0.9 :	88.78	90.28	91.80	93.32	94.84	96.38	97.93	99.48	101.04	102.61
1.0 :	104.19	105.77	107.37	108.97	110.58	112.19	113.82	115.45	117.09	118.74
1.1 :	120.39	122.05	123.72	125.40	127.09	128.78	130.48	132.18	133.90	135.62
1.2 :	137.35	139.08	140.83	142.58	144.34	146.10	147.87	149.65	151.44	153.23
1.3 :	155.03	156.83	158.65	160.47	162.29	164.13	165.97	167.82	169.67	171.53
1.4 :	173.40	175.27	177.15	179.04	180.94	182.84	184.74	186.66	188.58	190.50
1.5 :	192.44	194.37	196.32	198.27	200.23	202.20	204.17	206.14	208.13	210.12
1.6 :	212.11	214.12	216.12	218.14	220.16	222.19	224.22	226.26	228.30	230.35
1.7 :	232.41	234.47	236.54	238.62	240.70	242.79	244.88	246.98	249.08	251.19
1.8 :	253.31	255.43	257.56	259.69	261.83	263.98	266.13	268.28	270.45	272.61
1.9 :	274.79	276.97	279.15	281.34	283.54	285.74	287.95	290.16	292.38	294.60
2.0 :	296.83	299.07	301.31	303.56	305.81	308.06	310.33	312.59	314.87	317.15

CLEAR SPRINGS TROUT COMPANY



CLEAR SPRINGS – 22–Ft. Weir

DISCHARGE (CFS)

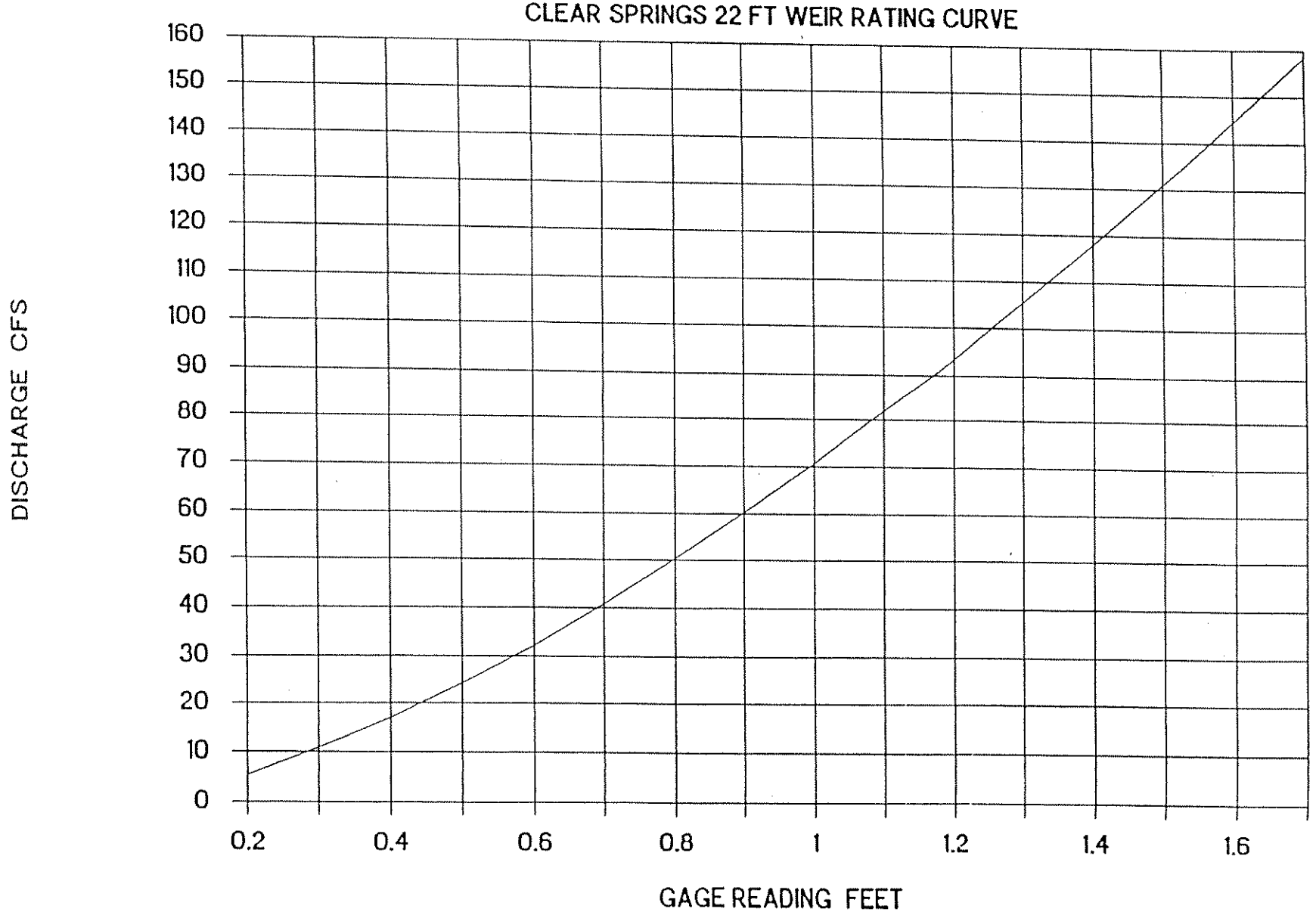
GAGE READING	0	0.01	0.02	0.03	0.04	0.05	0.06	0.07	0.08	0.09
0.2	5.60	6.07	6.55	7.05	7.56	8.08	8.61	9.16	9.71	10.27
0.3	10.85	11.44	12.03	12.64	13.25	13.88	14.51	15.16	15.81	16.48
0.4	17.15	17.83	18.52	19.21	19.92	20.64	21.36	22.09	22.83	23.58
0.5	24.33	25.10	25.87	26.64	27.43	28.22	29.03	29.83	30.65	31.47
0.6	32.30	33.14	33.99	34.84	35.70	36.56	37.43	38.31	39.20	40.09
0.7	40.99	41.90	42.81	43.73	44.65	45.58	46.52	47.46	48.42	49.37
0.8	50.33	51.30	52.28	53.26	54.25	55.24	56.24	57.24	58.25	59.27
0.9	60.29	61.32	62.35	63.39	64.44	65.49	66.54	67.60	68.67	69.74
1.0	70.82	71.90	72.99	74.09	75.19	76.29	77.40	78.52	79.64	80.76
1.1	81.90	83.03	84.17	85.32	86.47	87.63	88.79	89.96	91.13	92.31
1.2	93.49	94.67	95.87	97.06	98.26	99.47	100.68	101.90	103.12	104.34
1.3	105.57	106.81	108.05	109.29	110.54	111.79	113.05	114.31	115.58	116.85
1.4	118.13	119.41	120.69	121.98	123.28	124.58	125.88	127.19	128.50	129.82
1.5	131.14	132.46	133.79	135.13	136.46	137.81	139.15	140.50	141.86	143.22
1.6	144.58	145.95	147.32	148.70	150.08	151.47	152.86	154.25	155.65	157.05
1.7	158.45	159.86	161.28	162.69	164.12	165.54	166.97	168.40	169.84	171.28
1.8	172.73	174.18	175.63	177.09	178.55	180.02	181.49	182.96	184.44	185.92
1.9	187.40	188.89	190.38	191.88	193.38	194.88	196.39	197.90	199.42	200.94
2.0	202.46	203.99	205.52	207.05	208.59	210.13	211.67	213.22	214.77	216.33

CLEAR SPRINGS – 10–Ft. Weir

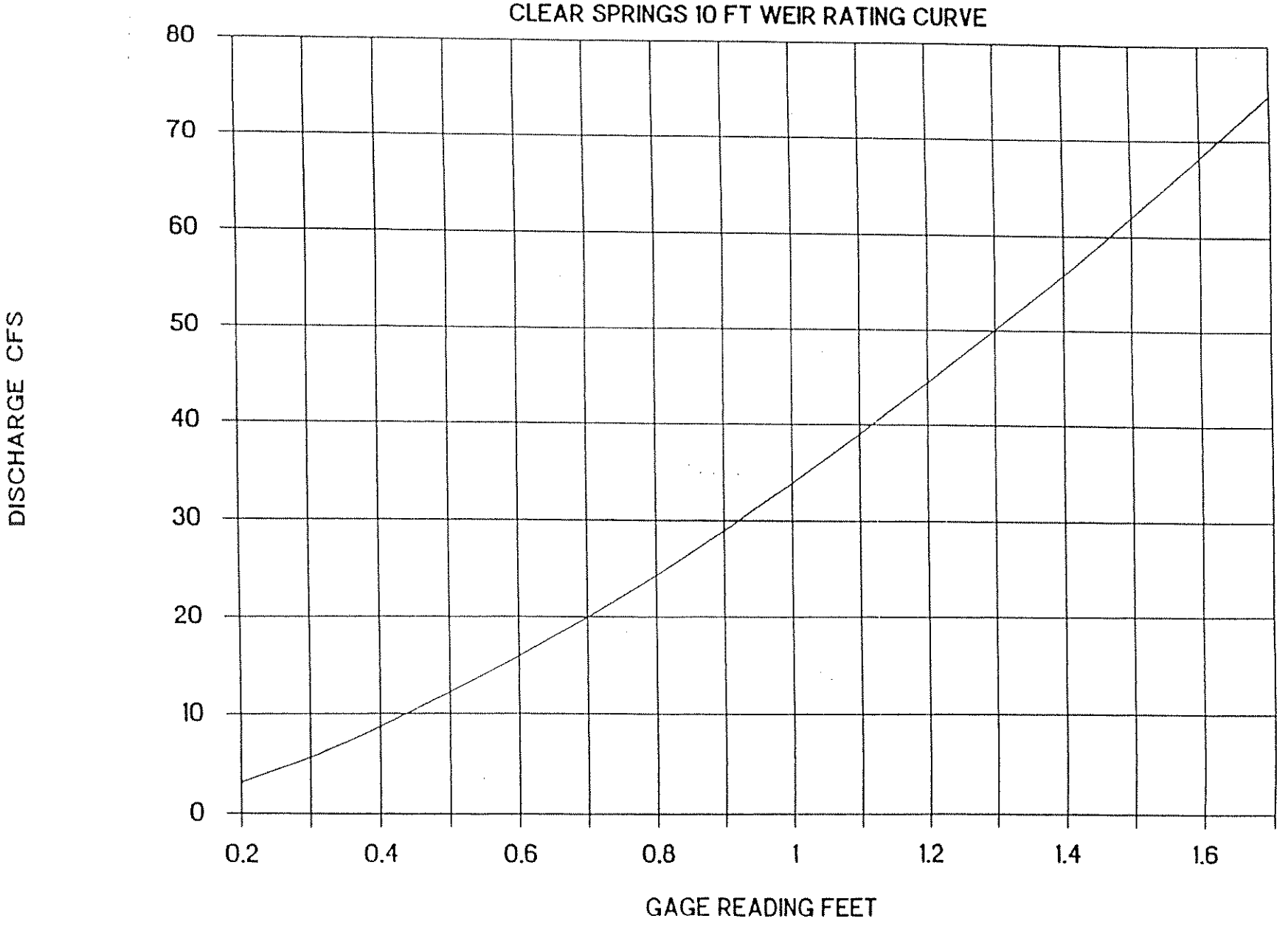
DISCHARGE (CFS)

GAGE READING	0	0.01	0.02	0.03	0.04	0.05	0.06	0.07	0.08	0.09
0.2	2.98	3.21	3.44	3.68	3.92	4.17	4.42	4.68	4.94	5.21
0.3	5.48	5.76	6.04	6.33	6.62	6.91	7.21	7.51	7.82	8.13
0.4	8.44	8.76	9.08	9.41	9.74	10.07	10.41	10.75	11.10	11.44
0.5	11.80	12.15	12.51	12.87	13.24	13.61	13.98	14.36	14.74	15.12
0.6	15.51	15.90	16.29	16.68	17.08	17.49	17.89	18.30	18.71	19.12
0.7	19.54	19.96	20.38	20.81	21.24	21.67	22.11	22.54	22.99	23.43
0.8	23.88	24.32	24.78	25.23	25.69	26.15	26.61	27.08	27.54	28.02
0.9	28.49	28.97	29.44	29.93	30.41	30.90	31.38	31.88	32.37	32.87
1.0	33.37	33.87	34.37	34.88	35.39	35.90	36.41	36.93	37.45	37.97
1.1	38.49	39.02	39.55	40.08	40.61	41.15	41.69	42.23	42.77	43.31
1.2	43.86	44.41	44.96	45.52	46.07	46.63	47.19	47.75	48.32	48.89
1.3	49.46	50.03	50.60	51.18	51.76	52.34	52.92	53.50	54.09	54.68
1.4	55.27	55.87	56.46	57.06	57.66	58.26	58.86	59.47	60.08	60.69
1.5	61.30	61.91	62.53	63.15	63.77	64.39	65.01	65.64	66.27	66.90
1.6	67.53	68.16	68.80	69.44	70.08	70.72	71.36	72.01	72.66	73.31
1.7	73.96	74.61	75.27	75.92	76.58	77.24	77.91	78.57	79.24	79.91
1.8	80.58	81.25	81.93	82.60	83.28	83.96	84.64	85.32	86.01	86.70
1.9	87.39	88.08	88.77	89.46	90.16	90.86	91.56	92.26	92.96	93.67
2.0	94.37	95.08	95.79	96.51	97.22	97.94	98.65	99.37	100.09	100.82

CLEAR SPRINGS TROUT COMPANY



CLEAR SPRINGS TROUT COMPANY



Clear Lakes -- 6 Ft Contracted Weir
Discharge in CFS adjusted for velocity of approach and weir elevation

Length = 6 Velocity Head = 0.00000

Gage Reading	0.00	0.01	0.02	0.03	0.04	0.05	0.06	0.07	0.08	0.09
0.2	1.84	1.98	2.12	2.26	2.40	2.55	2.70	2.86	3.01	3.17
0.3	3.33	3.50	3.66	3.83	4.00	4.18	4.35	4.53	4.71	4.90
0.4	5.08	5.27	5.46	5.65	5.84	6.04	6.24	6.44	6.64	6.84
0.5	7.05	7.26	7.47	7.68	7.89	8.11	8.33	8.54	8.77	8.99
0.6	9.21	9.44	9.67	9.90	10.13	10.36	10.60	10.83	11.07	11.31
0.7	11.55	11.79	12.04	12.28	12.53	12.78	13.03	13.28	13.53	13.79
0.8	14.04	14.30	14.56	14.82	15.08	15.35	15.61	15.88	16.14	16.41
0.9	16.68	16.95	17.23	17.50	17.78	18.05	18.33	18.61	18.89	19.17
1.0	19.46	19.74	20.03	20.31	20.60	20.89	21.18	21.47	21.76	22.06
1.1	22.35	22.65	22.95	23.25	23.55	23.85	24.15	24.45	24.76	25.06
1.2	25.37	25.67	25.98	26.29	26.60	26.92	27.23	27.54	27.86	28.17
1.3	28.49	28.81	29.13	29.45	29.77	30.09	30.41	30.74	31.06	31.39
1.4	31.72	32.04	32.37	32.70	33.03	33.37	33.70	34.03	34.37	34.70
1.5	35.04	35.38	35.71	36.05	36.39	36.73	37.08	37.42	37.76	38.11
1.6	38.45	38.80	39.15	39.49	39.84	40.19	40.54	40.89	41.25	41.60
1.7	41.95	42.31	42.66	43.02	43.38	43.74	44.09	44.45	44.81	45.17
1.8	45.54	45.90	46.26	46.63	46.99	47.36	47.72	48.09	48.46	48.83
1.9	49.20	49.57	49.94	50.31	50.68	51.06	51.43	51.80	52.18	52.56
2.0	52.93	53.31	53.69	54.07	54.45	54.83	55.21	55.59	55.97	56.36